American Bar Association
www.supremecourtpreview.org

No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL
UTILITY DISTRICT NUMBER ONE,
Appellant,
v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

OF COUNSEL:
CHRISTOPHER T. HANDMAN
DOMINIC F. PERELLA

H. THOMAS WELLS, JR.
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60654
(312) 988-5000

Counsel for Amicus Curiae American Bar Association

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 6

ARGUMENT 7

I. THE RECORD JUSTIFIES RE-AUTHORIZATION 7

II. THE UTILITY DISTRICT OVER-READS *BOERNE* AND IGNORES THE LIMITED NATURE OF THE SECTION 5 REMEDY 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page

Cases:

Bartlett v. *Strickland*,
--- S. Ct. ---, 2009 WL 578634
(U.S. Mar. 9, 2009) 9

City of Boerne v. *Flores*,
521 U.S. 507 (1997)..... *passim*

City of Rome v. *United States*,
446 U.S. 156 (1980)..... 18

Kimel v. *Florida Bd. of Regents*,
528 U.S. 62 (2000) 18

Lopez v. *Monterey County*,
525 U.S. 266 (1999)..... 18

South Carolina v. *Katzenbach*,
383 U.S. 301 (1966)..... 8, 17

Tennessee v. *Lane*,
541 U.S. 509 (2004)..... 3

Turner Broad. Sys. Inc. v. *FCC*,
520 U.S. 180 (1997)..... 17, 19

Turner Broad. Sys. Inc. v. *FCC*,
512 U.S. 622 (1994)..... 17, 19

Constitution:

U.S. Const. amend. XIV..... 17

Statutes:

42 U.S.C. § 1973a..... 14

TABLE OF AUTHORITIES—Continued

Page

42 U.S.C. § 1973c 3, 20

Legislative Materials:

152 Cong. Rec. S7748 (July 18, 2006) 15

H.R. Rep. No. 109-478 (2006) 9, 11, 12, 13, 14

Reauthorizing the Voting Rights Act's Temporary Provisions: Hearing on S. 2703 Before Subcomm. on Constitution, Civil Rights and Property Rights of S. Comm. on Judiciary, 109th Cong. 45 (2006) 10, 13, 14, 16

Rule:

S. Ct. R. 37.6..... 1

Other Authorities:

ABA 2006 Report with Recommendation (Policy adopted June 2006) 3, 4

ABA 2005 Report with Recommendation #108 (Policy adopted August 2005)..... 2, 4

ABA 1981 Report with Recommendation #105 (Policy adopted August 1981)..... 3

Letter From R. Alexander Acosta, Assistant Attorney General, Department of Justice, to Mayor H. Bruce Buckheister (Sept. 16, 2003)..... 10

TABLE OF AUTHORITIES—Continued

Page

Letter From John R. Dunne, Assistant Attorney General, Department of Justice, to Cynthia Young Rougeou, Assistant Attorney General, State of Louisiana (Oct. 23, 1990) 12

Letter From John R. Dunne, Assistant Attorney General, Department of Justice, to Secretary-Treasurer Robbie Shirley (Dec. 23, 1991)..... 12

Letter From Robert D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives (June 20, 2006)..... 5

Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives (July 12, 2006)..... 5, 15

Letter From Robert D. Evans, Director, ABA Governmental Affairs Office, to Senate (July 20, 2006) 5, 9

Letter from Herbert E. Hoffman, Director, ABA Governmental Relations Office, to Hon. Peter W. Rodino, House Judiciary Chairman (Oct. 5, 1981)..... 3

Letter From Bill Lann Lee, Acting Assistant Attorney General, Department of Justice, to Benjamin W. Emerson (Oct. 27, 1999)..... 11

TABLE OF AUTHORITIES—Continued

Page

Letter From William Bradford Reynolds, Assistant Attorney General, Department of Justice, to Ken W. Smith (July 8, 1988) 12

Letter From J. Michael Wiggins, Acting Assistant Attorney General, Department of Justice, to Al Grieshaber Jr. (Sept. 23, 2002) 10, 11

Laughlin McDonald, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union* (Mar. 2006) 10, 11, 12

Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005, Nat'l Comm'n on the Voting Rights Act (Feb. 2006) 11, 13, 15

IN THE
Supreme Court of the United States

No. 08-322

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE,
Appellant,
v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF APPELLEES

STATEMENT OF INTEREST[1]

The American Bar Association ("ABA") is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's more than 400,000 members span all 50 states and other jurisdictions,

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus*, its members, or its counsel made such a monetary contribution. This brief is filed with the consent of all the parties.

and include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and law students.[2]

As the national voice of the legal profession, the ABA has taken on a special responsibility for protecting the rights guaranteed by the Constitution and fostering the rule of law. As an active voice in promoting full and equal access to our nation's electoral process, the ABA has adopted a number of policies opposing discrimination against minorities, including at the ballot box. *See*, *e.g.*, *ABA 2005 Report with Recommendation #108,* Report at 1 & n.4 (Policy adopted August 2005).[3] The ABA has also participated as *amicus curiae* before this Court in cases delineating the scope of Congress's power under the

---

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to its filing.

[3] *Available at* http://www.abanet.org/leadership/2005/annual/dailyjournal/108.doc. The ABA's House of Delegates ("HOD") is the ABA's policymaking body and is comprised of more than 500 delegates. Reports with Recommendations may be submitted to the HOD by ABA delegates representing states and territories, state and local bar associations, affiliated organizations, sections and divisions, ABA members and the Attorney General of the United States, among others. The full HOD votes on the Recommendations. Those Recommendations that are adopted become ABA policy. *See* ABA Leadership, House of Delegates, General Information, *available at* http://www.abanet.org/leadership/delegates.html.

Reconstruction Amendments, including *Tennessee* v. *Lane*, 541 U.S. 509 (2004), and *City of Boerne* v. *Flores*, 521 U.S. 507 (1997).

The ABA has a special interest in this case because it has long had an official policy of supporting the Voting Rights Act (the "Act" or the "VRA"), a critical piece of legislation that "has been called the most effective civil rights law ever enacted." *ABA 2006 Report with Recommendation*, Report at 1 (Policy adopted June 2006) (available from the ABA).[4] More than 25 years ago, the ABA's House of Delegates adopted a resolution supporting the 1982 extension of Section 5 of the VRA,[5] emphasizing that that key provision has "not only enhanced the political posture of minority groups, but it has also advanced the very ideals that make our country's governmental system unique in political history." *ABA 1981 Report with Recommendation #105*, Report at 6 (Policy adopted August 1981) (available from the ABA). The ABA therefore called upon "Congress, the legal profession and all Americans * * * to continue this vital tool until there is no institutional practice in this country barring or discouraging citizens from fully exercising the right and responsibility of freely electing our public servants." Letter from Herbert E. Hoffman, Director, ABA Governmental Relations

---

[4] Because legislation reauthorizing the VRA was introduced in the United States House of Representatives on May 2, 2006 and in the Senate on May 3, 2006, but the ABA HOD did not meet until August 2006, this Report with Recommendation was adopted as ABA policy in June 2006 by the ABA's Board of Governors, acting pursuant to ABA by-laws, to permit the ABA to participate in the congressional debate.

[5] 42 U.S.C. § 1973c.

Office, to Hon. Peter W. Rodino, House Judiciary Chairman 2 (Oct. 5, 1981) (available from the ABA).

Twenty-five years later, the ABA repeated that same call when Section 5 came up for renewal once again. In 2005, the ABA House of Delegates resolved to support the 25-year extension of Section 5 that is now before the Court. The accompanying Report stated that "despite the progress that has been made since the passage of the Act, members of minority groups still face discrimination in exercising their right to vote." *ABA 2005 Report with Recommendation #108*, Report at 1. As discussed below, this finding tracks the evidence that was before Congress when it decided to renew Section 5.

The ABA reaffirmed its policy and conclusions in 2006, finding that Section 5 is one of the Act's "most important and effective" provisions; that it, along with its companion provisions, "will continue to be important factors and safeguards in making available the right to vote to all segments of our population"; and that it therefore "must be reauthorized." *ABA 2006 Report with Recommendation*, Report at 1, 4.

The ABA made its support for reauthorization clear to Congress as both houses were debating the legislation now on review before this Court. In a letter sent to all members of the House of Representatives, the ABA stated that "[t]he Voting Rights Act has been critical to the expansion of our democratic franchise to all eligible citizens" and that "reauthorization would allow progress to continue through enhanced access to the political process by all citizens, as well as by signaling a clear repudiation of discriminatory voting practices." Letter from Robert

D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives 1-2 (June 20, 2006).[6] In a letter to all members of the Senate, the ABA likewise explained that "[b]ecause of the persistence of discriminatory behavior in the election process," Section 5 and the rest of the Act "remain[ ] an essential tool in the struggle to preserve and protect voting rights for all Americans." Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to Senate 2 (July 20, 2006) ("ABA July 2006 Senate Letter").[7]

The ABA's views have not changed. The ABA firmly believes—and the evidence bears out—that difficult-to-remedy unconstitutional discrimination persists in the election process and that Section 5's work accordingly is not complete. Without Section 5, the dedicated lawyers who seek to vindicate voting rights in this Nation would face an even more difficult time when challenging discriminatory practices. The Act, in short, continues to "provide critical protections" against discrimination in voting. Letter from Robert D. Evans, Director, ABA Governmental Affairs Office, to House of Representatives 1 (July 12, 2006) ("ABA July 2006 House Letter"). The decision of the District Court should be affirmed.

---

[6] *Available at* http://www.abanet.org/poladv/letters/electionlaw/060620letter_vra_reauth_house.pdf.

[7] *Available at* http://www.abanet.org/poladv/letters/electionlaw/060720letter_vra_reauth_senate.pdf.

SUMMARY OF ARGUMENT

I. Appellant Northwest Austin Municipal Utility District Number One ("the Utility District") is incorrect in asserting that "[t]he record Congress amassed in 2006 * * * is not of the quality to demonstrate that § 5 remains a valid exercise of Congress's enforcement powers." App. Br. 2. The congressional record that supported Section 5's renewal is replete with evidence, both statistical and in the form of first-hand accounts, demonstrating the necessary predicates for Section 5—namely, that unconstitutional voting discrimination continues in the covered jurisdictions and that Section 5 is an effective tool to combat it. The legislative record is far more robust than the Utility District admits and is more than sufficient, under this Court's precedents, to justify Section 5's reauthorization.

II. The Utility District is also incorrect in its assertion that Section 5 is no longer a "congruent and proportional" remedy under *Boerne*—an assertion it bases in large part on the claim that Section 2 offers sufficient tools to attack the sorts of discrimination extant in covered jurisdictions. First, the argument wrongly assumes that *Boerne* somehow displaces the standard of review this Court has employed in repeatedly affirming Section 5's constitutionality. *See* NAACP Br. 23-26. Second, it contradicts Congress' factual findings as to Section 2. But even setting aside these problems, the argument fails because contrary to the Utility District's implicit suggestion, *Boerne* does not create a least-restrictive-means requirement. Instead, it guards against legislative attempts to expand constitutional rights by ensuring that Congress's prophylactic legislation (i) actually

targets demonstrable, unconstitutional state action and (ii) does not invalidate such a broad swath of state and local actions that it can no longer "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Boerne*, 521 U.S. at 531-532. Section 5 meets both criteria. To the extent *Boerne* applies to this case, it compels affirmance.

ARGUMENT

I. THE RECORD JUSTIFIES REAUTHORIZATION.

The Utility District's Section 5 argument relies on the premise that contemporary discrimination "of the type that justified § 5 is rare, if it exists at all, and cannot justify renewing § 5 for yet another generation." App. Br. 27. The record before Congress in 2006, however, was replete with evidence that precisely the type of behavior that justifies Section 5—unconstitutional voting discrimination—persists across the covered jurisdictions and would be even more prevalent in Section 5's absence. The robust legislative record is more than sufficient, under this Court's precedents, to justify Section 5's reauthorization.

1. The Utility District can argue that evidence supporting Section 5's reauthorization "is rare, if it exists at all," App. Br. 27, only by asserting that there must be a showing of "a systematic pattern of covered jurisdictions recently engaging in concerted efforts to game the system to the disadvantage of minorities by acting preemptively to impose new barriers to voting once old barriers are judicially deemed unenforceable." App. Br. 40-41.

As an initial matter, the record before Congress contained just such a showing: It included extensive evidence that particular jurisdictions have received multiple Section 5 objections, and in some cases have faced a combination of Section 5 objections and Section 2 lawsuits, since 1982. *See* Br. of Louis Intervenors 15-19, 47-51. But in any event, the Utility District's narrow understanding of Section 5 is not correct. As the Government has pointed out: "Although this Court recognized in *Katzenbach* that 'some' covered States had engaged in such [gamesmanship], the Court repeatedly stated that it was the cumbersome nature of case-by-case adjudication of voting cases" that prompted Congress to adopt the preclearance mechanism and that gamesmanship was "only one aspect of the larger failure of traditional legislative bans on discrimination in voting." U.S. Mot. to Affirm 18-19 (quoting and citing *South Carolina* v. *Katzenbach*, 383 U.S. 301, 313-314, 327-328, 335 (1966)) (internal citations omitted). *See also Boerne*, 521 U.S. at 526 (explaining that the VRA's "new, unprecedented remedies," including Section 5, "were deemed necessary given the ineffectiveness of the existing voting rights laws and the slow, costly character of case-by-case litigation") (citing *Katzenbach*, 383 U.S. at 313-315, 328).

The validity of Section 5's reenactment thus does not hinge on Congress being able to point to a "systematic pattern of covered jurisdictions * * * gam[ing] the system to the disadvantage of minorities." App. Br. 40. Instead, Congress has "wide latitude" in determining "measures that remedy or prevent unconstitutional actions." *Boerne*, 521 U.S. at 519. *Compare id.* at 528 (stating that the "rationales" for upholding Section 4(e) of the VRA "rested on

unconstitutional discrimination * * * and Congress' reasonable attempt to combat it"). The record compiled by Congress is replete with evidence both that "unconstitutional actions" persist and that Section 5 is an important tool to "remedy or prevent" them.

a. *Intentional Discrimination.* Congress explicitly found, in re-enacting Section 5, that hundreds of voting-rule changes sought by covered jurisdictions between 1982 and 2006 "were calculated decisions to keep minority voters from fully participating in the political process." Those calculated and intentional decisions—had the Attorney General not interceded under the authority of the VRA—would have unconstitutionally deprived citizens of their right to vote. H.R. Rep. No. 109-478 at 21 (2006) ("*2006 House Report*"); *see also* ABA July 2006 Senate Letter ("Because of the persistence of discriminatory behavior in the election process, the Act remains an essential tool in the struggle to preserve and protect voting rights for all Americans."); *Bartlett* v. *Strickland*, --- S. Ct. ---, 2009 WL 578634, at *16 (U.S. Mar. 9, 2009) (op. of Kennedy, J.) (observing that "racial discrimination and racially polarized voting are not ancient history" and that "[m]uch remains to be done to ensure that citizens of all races have equal opportunity to share and participate in our democratic processes and traditions"). Congress's finding on this score is amply supported by the record it amassed:

- In 2005, the Department of Justice "blocked a redistricting plan in the Town of Delhi, Louisiana, after finding it was motivated by intent to retrogress [and] would have eliminated an African-American opportunity district." *Reauthorizing the Voting Rights Act's Temporary Provi-*

sions: Hearing on S. 2703 Before Subcomm. on Constitution, Civil Rights and Property Rights of S. Comm. on Judiciary, 109th Cong. 45 (2006) ("*Senate Hearing*") (Response of Debo P. Adegbile).

- In 2003, the Department of Justice blocked a proposed municipal annexation in the Town of North, South Carolina, finding that the town intentionally made a habit of allowing white petitioners to annex their property to the town—and thus increase the white voting base—while "largely ignor[ing]" the requests of black residents to do the same. *Senate Hearing* at 60 (Response of Debo P. Adegbile) (citing Letter From R. Alexander Acosta, Assistant Attorney General, Department of Justice, to Mayor H. Bruce Buckheister (Sept. 16, 2003)).

- Following the 2000 census, the Department of Justice blocked the City of Albany, Georgia's redistricting plan, finding that the plan intentionally split what should have been a majority-black ward. The Department's letter of objection concluded it was "implicit" that "the proposed plan was designed with the purpose to limit and retrogress the increased black voting strength in Ward 4, as well as in the city as a whole." Laughlin McDonald, *The Case for Extending and Amending the Voting Rights Act: Voting Rights Litigation, 1982-2006: A Report of the Voting Rights Project of the American Civil Liberties Union* 5 (Mar. 2006) ("*McDonald Report*") (quoting Letter From J. Michael Wiggins, Acting Assistant Attorney General, De-

partment of Justice, to Al Grieshaber Jr. (Sept. 23, 2002)) (quotation marks omitted).[8]

- In 1999, officials in Dinwiddie County, Virginia moved a polling place from a hunt club with a large black membership to a church located as far as possible from the precinct's black population center. The Department of Justice objected to the change, finding that the polling place was moved for discriminatory reasons. 152 Cong. Rec. S7748 (July 18, 2006) (statement of Sen. Leahy) (citing Letter From Bill Lann Lee, Acting Assistant Attorney General, Department of Justice, to Benjamin W. Emerson (Oct. 27, 1999)).

- In 1992, white officials in black-majority Hale County, Alabama physically held polling-place doors closed to prevent black voters from entering the precinct to cast votes. A black legislator who managed to pull one of the doors open to let voters in was arrested. *Protecting Minority Voters: The Voting Rights Act at Work, 1982-2005*, Nat'l Comm'n on the Voting Rights Act 62-63 (Feb. 2006) ("*NCVRA Report*").

- In 1991, the Police Jury in Concordia Parish, Louisiana announced that it would reduce its size from nine members to seven, thereby eliminating a black-majority district. The Department of Justice rejected the change, finding the locality's cost-saving justification pretextual and

---

[8] The *McDonald Report* and the other reports cited in this section were submitted into the record during the congressional hearings on Section 5's re-enactment. *See 2006 House Report* at 21 n.48; *id.* at 38 n.82.

noting that the parish had seen no need to save money until an influx of black residents "flipped" the district in question from majority-white to majority-black. *2006 House Report* at 23 (citing Letter From John R. Dunne, Assistant Attorney General, Department of Justice, to Secretary-Treasurer Robbie Shirley (Dec. 23, 1991)).

- In 1990, the City of Monroe, Louisiana attempted to annex white suburban wards to its city court jurisdiction. The Department of Justice objected, noting that the wards in question had been eligible for annexation since 1970 but that there had been no interest in annexing them until just after the first-ever black candidate ran for city court. *2006 House Report* at 23 (citing Letter From John R. Dunne, Assistant Attorney General, Department of Justice, to Cynthia Young Rougeou, Assistant Attorney General, State of Louisiana (Oct. 23, 1990)).

- In 1988, the Department of Justice rejected a Lumber City, Georgia ordinance that contained certain majority-vote and numbered-post requirements for city elections. The Department found that the requirements had blocked the election of a black candidate and that they were "tainted, at least in part, by a proscribed purpose." *McDonald Report* at 434-435 (quoting Letter From William Bradford Reynolds, Assistant Attorney General, Department of Justice, to Ken W. Smith (July 8, 1988)) (quotation marks omitted).

These are far from the only examples of post-1982 intentional discrimination in the record before Con-

gress. On the contrary, as the Government has noted, "[b]etween 1980 and 2000, the Attorney General interposed 421 objections based wholly or partially on discriminatory intent." U.S. Mot. to Affirm 21 (citing J.S. App. 76-77). *Compare Boerne*, 521 U.S. at 530 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry.").

Furthermore, the witnesses who appeared before Congress testified that intentional discrimination is still a disturbingly widespread and frequent occurrence—a finding Congress adopted, as it was entitled to do. *See 2006 House Report* at 21. Debo P. Adegbile, Associate Director of Litigation for the NAACP Legal Defense and Educational Fund, Inc., testified that "the congressional record is replete with examples of continuing voting discrimination against racial minorities in the covered jurisdictions" and that a "surprisingly significant" number of the post-1982 objection letters issued by the Department of Justice involve findings of intentional discrimination. *Senate Hearing* at 52, 73. As to Louisiana specifically, Adegbile testified that "[s]ignificant * * * voting changes adopted with retrogressive purpose" continue to be "commonplace." *Id.* at 130. Likewise, the National Commission on the Voting Rights Act ("NCVRA") concluded that "efforts to suppress the minority vote, while not as systematic and pervasive as those of the pre-Act South, are still encountered in every election cycle across the country." *NCVRA Report* at 7.

The record also suggests that the numerical tally of intentional-discrimination objection letters and court findings understates the actual prevalence of uncon-

stitutional discrimination. As appellees have pointed out, since 1982, the Attorney General and the D.C. District Court have interposed more than 750 Section 5 objections to more than 2,400 proposed voting changes based on findings that those changes were discriminatory; an additional 1,100 changes have been abandoned or modified in response to more-information-request letters; and plaintiffs in covered states have been successful in more than 650 lawsuits under Section 2 of the Act, 42 U.S.C. § 1973a. U.S. Mot. to Affirm 15-16.

The Utility District apparently would disregard this evidence as insufficiently reflective of intentional discrimination. *E.g.*, App. Br. 53. However, as to requests for more information, the evidence demonstrated, and Congress affirmatively found, that a locality's withdrawal of a proposed change often signals that the locality had an improper motive in the first place. *2006 House Report* at 40-41. Furthermore, there was record evidence suggesting that many of the cases that resulted in discriminatory-effect findings from the Department of Justice and the courts may also have involved discriminatory intent. As Professor Karlan explained in testimony before the Senate: "One consequence of the 1982 amendment of section 2 is that plaintiffs are rarely called upon to prove, and courts are rarely called upon to find, that a defendant jurisdiction has engaged in purposeful racial discrimination that would violate the Constitution as well. This is not to say that such purposeful discrimination does not exist." *Senate Hearing* at 173 (testimony of Prof. Pamela S. Karlan).

b. *Efficacy of Section 5*. Congress likewise compiled extensive record evidence demonstrating that Section 5 is an effective—and irreplaceable—tool to remedy and prevent persistent unconstitutional voting discrimination. In addition to the pure numbers of objection letters and withdrawn proposals recounted above, the evidence demonstrated that "the deterrent effect of Section 5 is substantial." *NCVRA Report* at 57; *see also 2006 House Report* at 24 (adopting NCVRA finding). After holding 10 hearings across the nation and hearing from 100 witnesses, the NCVRA recounted evidence that "[o]nce officials in covered jurisdictions become aware of the logic of preclearance, they tend to understand that submitting discriminatory changes is a waste of taxpayer time and money and interferes with their own timetables, because the chances are good that an objection will result." *NCVRA Report at 57*; *accord Senate Hearing* at 169-170 (testimony of Prof. Karlan) (concluding that Section 5 performs a deterrent function and that the deterrent function is "especially important with respect to changes at the local level").

The evidence also demonstrated that Section 5's deterrent effect continues to play a "critical role in minority citizens' political integration" because "the political gains minority citizens have achieved since the passage of the Act are sufficiently recent and the incentives for officials to ignore the interests of minority voters are sufficiently attractive that backsliding would occur in the absence of the Act's substantive and procedural protections." *Senate Hearing* at 168-169 (testimony of Prof. Karlan); *see also* ABA July 2006 House Letter 2 (stating that the Act's "special remedial provisions have enabled the federal

government to enforce the prohibition on discriminatory voting practices and mechanisms. These provisions have been very effective at enhancing the democratic principles that form the foundation of our nation.").

Nor was the evidence before Congress supportive of the Utility District's assertion that Section 5 is no longer necessary because "[t]he voting-rights problems Congress identified in the 2006 record * * * are quickly and fully remedied by § 2 and other substantive prohibitions." App. Br. 27. To the contrary, the record demonstrated that private lawsuits are often cumbersome and unable to prevent the more pervasive forms of second-generation voting discrimination: last-minute attempts to move polling booths, eleventh-hour attempts to delay elections, and the like. As the General Counsel of the North Carolina State Board of Elections testified: "Section 2 cases are complex and can take several years to fully litigate at the trial level, exclusive of any appeals. In the meantime, the discriminatory voting change is put into effect, which would not happen under Section 5." *Senate Hearing* at 121 (testimony of General Counsel Don Wright). Wright explained that even if the Section 2 litigation is ultimately successful, "the damage is often already done: elections may have been held under an unlawful plan, providing candidates elected under that plan an advantage in terms of incumbency and fundraising under any remedial plan that might be adopted." *Id.*; *see also* Br. of Louis Intervenors 10-11 (cataloguing additional evidence).

2. Rather than address the entirety of the record before Congress, the Utility District focuses on the

evidence of gamesmanship. App. Br. 43-54. But that approach ignores the broader purpose of Section 5 that this Court acknowledged in *Katzenbach*. *See* 383 U.S. at 314, 327-328 (discussing limitations of case-by-case litigation). And to the extent the Utility District contests the evidence before Congress—arguing, for instance, that Section 2 is up to the task currently performed by Section 5—its argument would require this Court to ignore the extensive record from which Congress concluded that Section 5 is essential for both confronting and deterring a myriad of unconstitutional voting discrimination attempts. In short, the Utility District forgets that this Court "owe[s] Congress' findings deference in part because the institution 'is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon' legislative questions." *Turner Broad. Sys. Inc.* v. *FCC*, 520 U.S. 180, 195 (1997) ("*Turner II*") (quoting *Turner Broad. Sys. Inc.* v. *FCC*, 512 U.S. 622, 665-666 (1994) ("*Turner I*")).

II. THE UTILITY DISTRICT OVERREADS *BOERNE* AND IGNORES THE LIMITED NATURE OF THE SECTION 5 REMEDY.

The Utility District bases its argument for Section 5's unconstitutionality on *Boerne*'s "congruence and proportionality" test, but the argument is not supported by either *Boerne*'s holding or its animating logic.

1. The Utility District contends, in effect, that (i) *Boerne* imposes on Congress a strict scrutiny-style least-restrictive-means requirement and (ii) Section 5 does not meet this standard because, among other things, Section 2 suffices to address the voting-discrimination problems identified in the record.

See, e.g., App. Br. 36-37. Besides being counter to the evidence presented to Congress, *see supra* at 16—and besides incorrectly assuming that *Boerne* somehow altered the deferential framework for Section 5 review that this Court has employed for decades[9]—this argument attributes to *Boerne* a test that the case did not announce. Indeed, the argument entirely disregards *Boerne*'s recognition that Congress has the power to " 'prohibit changes that have a discriminatory impact' " as a way to reach demonstrable intentional discrimination—a power that cannot be reconciled with a least-restrictive-means requirement. 521 U.S. at 532 (quoting *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980)); *accord Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (reaffirming Congress' power under Section 5 of the Fourteenth Amendment to enforce a constitutional right by "prohibiting a somewhat broader swath of conduct" than is forbidden by the Constitution).

The *Boerne* test is, instead, a mechanism to ensure that remedial legislation does not "become substantive in operation and effect" by decreeing a different or more fulsome right than the one guaranteed by the Constitution. 521 U.S. at 519-520. To that end, the *Boerne* Court struck down the Religious Freedom Restoration Act ("RFRA") because the statute expressly targeted a type of state action not forbidden by the Fourteenth Amendment, and it did so based on a legislative record devoid of evidence of unconsti-

---

[9] *See* NAACP Br. 23-26; *see also Lopez* v. *Monterey County*, 525 U.S. 266, 283 (1999); *City of Rome* v. *United States*, 446 U.S. 156, 177 (1980); *Katzenbach*, 383 U.S. at 326.

tutional state action in need of a remedy. *Id.* at 530-532.

2. This case simply does not trigger the concerns that animated *Boerne*. Congress found in reauthorizing Section 5 of the VRA that localities continue to enact unconstitutional—not just undesirable—voting rules. *See supra* at 9-14. Furthermore, Congress found that Section 5 has been used to block hundreds of voting laws and rules that were motivated by racial discrimination. J.S. App. 77. A claim that Section 5 does not target unconstitutional behavior, s*ee* App. Br. 42-56, disregards the substantial record compiled by Congress. As this Court has held, "[t]he Constitution gives to Congress the role of weighing conflicting evidence in the legislative process." *Turner II*, 520 U.S. at 199; *see id.* at 195 (court's sole obligation in reviewing constitutionality of a statute is " 'to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence,' " with substantiality measured "by a standard more deferential than we accord to judgments of an administrative agency") (quoting *Turner I*, 512 U.S. at 665-666).

3. Nor can the impact of Section 5's preclearance requirement be fairly compared to the statute struck down in *Boerne*. Indeed, *Boerne* itself contrasted the VRA (including Section 5) with RFRA and held up the former as a model of congruent, proportional legislation. *See* 521 U.S. at 526. *Boerne* highlighted the VRA's focus on a single class of state laws, its expiration date, and its geographical restrictions; all were features absent from RFRA. *See id.* at 525-526.

An additional and important difference between RFRA and Section 5 of the VRA must be noted:

Section 5 does not strike down the vast majority of laws within its scope; it instead merely delays their enactment for a period of weeks, giving the Attorney General time to identify those few that raise concerns of discrimination. *See* 42 U.S.C. § 1973c(a) (creating 60-day review period). It is inaccurate, in other words, for the Utility District to assert that Section 5 "preempts every change related to voting * * * in covered jurisdictions." App. Br. 38 (emphasis deleted). Section 5 *affects* every change related to voting; it *preempts* a small proportion of those proposed. This is a crucial distinction from *Boerne*, which addressed itself to a statute that "*displac[ed]* laws and *prohibit[ed]* official actions of almost every description." 521 U.S. at 532 (emphases added).

Boerne, in short, was a case about the categorical prohibition of constitutional behavior; this is a case about contingent delay aimed at preventing unconstitutional behavior. To the extent it applies here, *Boerne* compels affirmance.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

OF COUNSEL:
CHRISTOPHER T. HANDMAN
DOMINIC F. PERELLA

H. THOMAS WELLS, JR.
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 North Clark Street
Chicago, Illinois 60654
(312) 988-5000

Counsel for Amicus Curiae American Bar Association